U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 September 2006

CASE NO.: 2006-LHC-538

OWCP NO.: 07-165503

J. B.,
Claimant

v.

PERF-O-LOG, INC.,
Employer

and

HIGHLANDS INSURANCE CO.,
Carrier

APPEARANCES:

Brian C. Colomb, Esq.
On behalf of Claimant

Douglass M. Moragas, Esq.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq*., (2000) brought by J. B. (Claimant) against Perf-O-Log, Inc., (Employer) and Highlands Insurance Company (Carrier). The issues raised by the parties could

not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on July 19, 2006, in Lafayette, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 7 exhibits which were admitted, including medical records from Drs. Chris Hebert, Douglas Bernard, Thomas Boreland; medical records of Iberia Medical Center; Claimant's personnel file; medical bills and expenses incurred by Claimant as a result of his April 10, 2001 injury. Employer introduced 9 exhibits which were admitted including depositions and records of Drs. Schutte, Hebert, Bernard; various DOL forms (LS-215a, 203, 207); Claimant's pre-employment physical, wage records medical bills and expenses.[1]

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on April 10, 2001 in the course and scope of his employment as an employee of Employer.

2. Employer was advised of injury on April 10, 2001 and December 4, 2002 by LS-203.

3. An informal conference was held on July 8, 2003.

4. Employer filed a Notice of Controversion on December 10, 2002.

5. Claimant's average weekly wage at time of injury was $ 652.09[2][3]

II. ISSUES

The following unresolved issues were presented by the parties:

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[1] References to the transcript and exhibits are as follows: trial transcript- Tr.___; Claimant's exhibits- CX-____, p.____; Employer exhibits- EX-___, p.___; Administrative Law Judge exhibits- ALJX-____; p.____.

[2] In its brief Claimant agreed with Employer's calculation of average weekly wage.

1. Prescription: whether Claimant should have filed his claim within a year of his April 10, 2001 injury.

2. Nature and extent of injury and disability.

3. Attorney fees and expenses.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant is as 30 year old male born on December 16, 1977. (Tr. 13). Claimant has a 12th grade education with prior experience as a oil field rigger which involved heavy work in lining up and attaching strings of pipe each weighing between 65 to 80 pounds, carrying and inserting explosive charges in casing, loading 18 wheelers with power packs, tool boxes weighing up to 100 pounds. (Tr. 15-18; CX-5).

In 1997, Claimant was involved in an auto accident in which he broke his right fibula requiring casting for a period of 10-16 weeks. Dr. Boreland treated Claimant for this condition. The fracture healed without any residual problems or symptoms. At the end of 1999 or beginning of 2000 Claimant began working for Employer as a rigger. Claimant did this job for about a year and then quit to work for another employer doing the same type of work. Subsequently Employer rehired Claimant after he took and passed a physical on March 10, 2000. (Tr. 19-22, 39, 66). The March 10, 2000 physical showed Claimant's right ankle to be somewhat larger than the left ankle. (EX-8).

On April 10, 2001, while attaching lubricators, Claimant slipped on a greased hose and jarred his right ankle. Immediately Claimant felt a popping sensation and intense pain at a level 8 out of 10 with 0 being no pain and 10 being unbearable pain. Claimant reported the accident to his foreman after which Employer flew Claimant back to its main office in Broussard where he filled out paperwork and then proceeded to a clinic in Broussard. There he was told he had a bad sprain. (Tr. 23-25). Claimant requested additional medical treatment whereupon Employer took him to Dr. Schutte who x-rayed the ankle, told him he needed surgery and restricted him to light work. Claimant worked light duty for about two weeks after which he returned to full duty as a hot shot driver delivering equipment or gear to either a heliport or dock for transport offshore. (Tr. 26, 27).

While delivering supplies Claimant had to take pain medication (Lortab) and because of his ankle was not able to lift heavy objects such as tool boxes or boxes of primer cords. (Tr. 28). Once reassigned to offshore work Claimant was unable to lift lubricators or climb to climb trees to turn flanges off and on. (Tr. 29). Claimant continued to experience severe ankle pain and so

informed management of his condition. Employer referred Claimant to Dr. Bernard who in turn recommended Claimant stop work and undergo surgery which Claimant did to alleviate level 8 to 9 pain. (Tr. 29-31).

Despite surgery Claimant continued to experience severe pain but at a reduced level 4 or 5 except when standing for prolonged periods of time during which the pain level increased to a level 8. (Tr. 32). Claimant reduced the pain intensity by soaking it in hot water and elevating it. Employer put Claimant on short term and then long term disability rather than workers' compensation so as to avoid a claim for a lost-time accident. (Tr. 33, 34). Claimant paid some of the medical bills for Drs. Hebert, Bernard, and Schutte. (Tr.35). However, most of the medical bills remain unpaid. (Tr. 67). Since Claimant's April 10, 2001 accident Claimant has incurred $8,027.78 in medical expenses. (CX-6, 7).

On cross Claimant admitted having ankle sprains in both ankles between 1997 and 2001 but claimed each of those sprains resolved themselves within several days. (Tr. 41). Claimant testified that he has not worked since leaving Employer, but did look for work with logging companies in Woodville, Texas. (Tr. 47) Once Claimant informed those employers about his work limitations he was not hired. (Tr. 14,15, 48, 50). Claimant also admitted that none of his doctors have placed any restrictions on him and that Dr. Schutte released him to full duty shortly after his injury. (Tr. 57). Further, Claimant admitted receiving his wages until his surgery in June. (Tr. 59). The record showed Claimant receiving his last paycheck for the week of June 5, 2001. (Tr. 69, EX-9). Subsequently, Claimant has been receiving short term and long term disability checks from Unum. (CX-2, CX-5, pp. 13-18, 22). On November 13, 2002 Claimant filed the current claim for compensation. (CX-5, p. 23).

C. Testimony of Drs. Schutte, Hebert, and Bernard

Dr. Schutte, a board-certified orthopedic surgeon, testified that he first saw Claimant on April 10, 2001 on a referral from Gerald Bellow, Occupational Medicine Clinic of Acadiana. Claimant reported slipping, falling, and twisting his right ankle while at work with a past ankle fracture in 1997. Upon examination Claimant was 5 feet 11 inches weighing 180 pounds with tenderness and mild ankle swelling. Claimant complained of pain on the lateral side. X-rays which Claimant brought with him from the Clinic showed Claimant had a previous 1997 pronational eversion ankle fracture with some lateral talus subluxation. Dr. Schutte treated Claimant for a sprain by putting his ankle in an air cast allowing him to bear weight as tolerated. (EX-1, pp.1-3; CX-2).[4]

Claimant returned to Dr. Schutte in two weeks as instructed whereupon Dr. Schutte re-examined the ankle, found reduce swelling and full weight bearing with a small evulsion of the lateral malleolus. Dr. Schutte released Claimant to full duty advising Claimant of lateral ankle subluxation with possible future arthritis as a sequela of his previous fracture. (EX-4).

[4] Medical records from Dauterive Hospital in 1997 show Claimant undergoing a series of right ankle X-rays which revealed a fracture of the distal fibula above the tibial plateau. (CX-4, p. 4).

Following this visit Claimant went to Dr. Bernard who operated on or debrided the ankle removing bone spurs.

Dr. Schutte testified that the ankle surgery had nothing to do with the ankle sprain, but rather, was related to removing degenerative changes from his previous ankle fracture. (Id. at 4). Dr. Schutte further testified that Claimant had fully recovered from the ankle sprain with no residuals, but would need an ankle fusion in the future due to the previous ankle fracture. Further, because of the previous 1997 ankle fracture, Claimant had experienced some ankle pain despite denials to the contrary.

Dr. Hebert, a board certified orthopedic surgeon, testified that he examined Claimant on December 18, 2002 for persistent ankle pain. Dr. Hebert reviewed Claimant's medical history consisting of conservative treatment by Dr. Schutte and surgery by Dr. Bernard and x-rays taken in 1997 showing a fibula fracture; April 10, 2001 x-rays showing a healed fracture with degenerative changes consistent with 4 years of post- traumatic arthritic changes; and December, 2002, x-rays showing further degenerative changes of the tibiotalar articulation from the 1997 fracture or natural progression of ankle arthritis. (EX-2, p.3, 4).

Dr. Hebert testified about Dr. Bernard's surgical removal of bone spurs as a result of the natural progression of Claimant's 1997 injury with a resolution of the 2001 ankle sprain. Dr. Hebert did not recommend ankle fusion due to Claimant's age. Dr. Hebert found it hard to believe that Claimant with bones spurs and a degenerative ankle process would have been asymptomatic from 1997 to April 10, 2001. (EX-2, p. 7, EX-5).

Dr. Bernard, a board-certified orthopedic surgeon, testified that he first saw Claimant on June 7, 2001 for right ankle pain. Dr. Bernard took a medical history from Claimant, examined him and found spurring and osteophytes of the right fibular region of the lateral side or outside of the ankle. Claimant lacked dorsey flexion indicative of a long standing, symptomatic condition (EX-3, p. 4). Dr. Bernard saw no evidence of any significant ankle injury in April, 2001. Rather, he saw Claimant suffering from a 4 year old ankle fracture. (EX-3, p.5). There was no evidence of any ankle sprain (Id. at 6). The 1997 and 2001 x-rays showed a "relatively non-displaced ankle fracture which healed in a malpositioned or malunion. Dr. Bernard operated on Claimant's right ankle on June 15, 2001 performing an arthrotomy, cheilectomy and chondroplasty of the talus and debridement of the lateral corner of the ankle joint. (EX-6, CX-1, CX-2, p. 3).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that: (1) he suffered a fibula fracture in 1997mid way between the knee and right ankle not involving the right ankle; (2) Dr. Borland who treated Claimant put the right leg in a cast for two months after which Claimant returned to heavy manual work never experiencing any pain or problems with his right leg, ankle or foot; (3) as a result of the April 10, 2001 accident Claimant has experienced severe and disabling right ankle pain which despite

surgery remains at a constant level 4 to 5 on a scale of 1 to 10 which increases to a level 8 after standing for long periods of time; (4) Claimant has tried unsuccessfully to return work in his community of Chester, Texas;. (5) Claimant established a *prima facie* case of total disability which Employer/Carrier failed to rebut by showing either an injury to the right ankle or an aggravation of a pre-existing condition; (6) Claimant notified Employer of the injury on April 10, 2001 thereby satisfying the notice requirements of Section 12 of the Act; (7) Employer continued to pay Claimant his salary up through June, 2001, and thereafter, paid him disability benefits through a short and long term disability Unum policy up through the time he filed an LS-203 claim for benefits thus interrupting prescription; (8) Employer failed to show any prejudice by Claimant's claim filing on November 12, 2003, thus, undermining any prescriptive argument it may have had.

Employer contends that: (1) Claimant sustained a right ankle sprain on April 10, 2001 which by April 24, 2001 had resolved without any residual allowing Claimant to return to full unlimited duty; (2) Claimant sustained a fractured fibula in 1997 which produced degenerative changes by April, 2001, including bone spurs, a malunion of the tibia, fibula, and talus causing a subluxation of the fibula at the ankle joint; (3) the April 10,2001 ankle sprain did not cause or aggravate Claimant's pre-existing ankle injury; (4) Claimant's testimony that the 1997 fibula fracture healed in 10 to 16 weeks without any subsequent pain or problem is incredible; (5) Employer paid all medical bills associated with Claimant's April 10, 2001 accident; (6) Claimant sustained no lost time and no lost wages as a result of the April 10, 2001 injury; (7) Claimant failed to timely submit a claim and under Section 12 of the Act his claim prescribed.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. ***Banks v. Chicago Grain Trimmers Association, Inc.*****,** 390 U.S. 459, 467 (1968); ***Louisiana Insurance Guaranty Assn., v. Bunol***, 211 F.3d 294, 297 (5th Cir. 2000); ***Hall v. Consolidated Employment Systems, Inc.***, 139 F.3d 1025, 1032 (5th Cir. 1998); ***Atlantic Marine, Inc., v. Bruce*****,** 551 F.2d 898, 900 (5th Cir. 1981); ***Arnold v. Nabors Offshore Drilling, Inc.***, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. ***Banks*****,** 390 U.S. at 467; ***Mijangos v. Avondale Shipyards, Inc.***, 948 F.2d 941, 945 (5th Cir. 1991); ***Huff v. Mike Fink Restaurant, Benson's Inc.***, 33 BRBS 179, 183 (1999).

In this case Claimant's credibility is a primary issue with Claimant asserting he had no residual pain or problems following his 1997 fibula fracture and in fact had no ankle problems until his April 10, 2001 accident. In view of the long standing degenerative changes found by the orthopedists, Drs. Schutte, Bernard and Hebert, I find in agreement with these physicians that it is more probable than not that Claimant had ankle pain from his 1997 accident due to degenerative changes despite the fact he did heavy work following the 1997 injury. I do not credit Claimant's testimony of being asymptomatic from his 1997 injury up through the April 2001 incident. However, I credit his testimony that despite having ankle sprains from 1997 to

April 10, 2001 he was able to successfully perform heavy work. Indeed there is no evidence to the contrary.

C. Causation

Section 2(2) of the Act defines injury as an accidental injury or death arising out of or in the course of employment. 33 U.S.C. § 902(2)(2003). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary
>
> (a) That the claim comes within the provisions of this chapter

33 U.S.C. § 920(a) (2003).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated Cir. 2000); ***Kier v. Bethlehem Steel Corp.*,** 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Hunter*,** 227 F.3d at 287. [T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. ***U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*,** 455 U.S. 608, 615, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also* ***Bludworth Shipyard Inc., v. Lira*,** 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); ***Devine v. Atlantic Container Lines*,** 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer and a *prima facie* case must be established before a claimant can take advantage of the presumption). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. ***Hunter***, 227 F.3d 287-88.

In order to show the first element of harm or injury a claimant must show that something has gone wrong with the human frame. ***Crawford v. Director, OWCP*,** 932 F.2d 152, 154 (2nd Cir. 1991); ***Wheatley v. Adler*,** 407 F.2d 307, 311-12 (D.C.Cir. 1968); ***Southern Stevedoring Corp. v. Henderson*,** 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. ***Adkins v. Safeway Stores, Inc.*,** 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. ***Gooden v. Director, OWCP*,** 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); ***Kubin v. Pro-Football, Inc.***, 29 BRBS 117, 119 (1995) (pre-existing back injuries).

In order to establish the second element, a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm. Rather a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a mere fancy or wisp of what might have been. ***Wheatley v. Adler*****,** 407 F.2d 307, 313 (D.C. Cir. 1968). A claimant's un-contradicted credible testimony alone may constitute sufficient proof of physical injury. ***Hampton v. Bethlehem Steel Corp.***, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); ***Golden v. Eler & Co.***, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980) (same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that conditions existed at work that could have caused the harm. ***Bonin v. Thames Valley Steel Corp.*****,** 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have cause his depression); ***Alley v. Julius Garfinckel & Co.*****,** 3 BRBS 212, 214-15 (1976) (finding the claimant's uncorroborated testimony on causation not worthy of belief); ***Smith v. Cooper Stevedoring Co.*****,** 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, ***Leblanc v. Cooper/T. Stevedoring, Inc.***, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); ***Gencarelle v. General Dynamics Corp***., 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. ***Quinones v. H.B. Zachery, Inc.*****,** 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts not mere speculation that the harm was not work-related. ***Conoco, Inc. v. Director, OWCP*****,** 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether the employer has succeeded in establishing the lack of a causal nexus. ***Gooden v. Director, OWCP*****,** 135 F.3d 1066, 1068 (5th Cir. 1998); ***Bridier v. Alabama Dry Dock & Shipbuilding Corp.***, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered an prior, unquantifiable hearing loss); ***Hampton v. Bethlehem Steel Corp.***, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); ***Dower v. General Dynamics Corp.***, 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present substantial evidence that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption the kind of evidence

> a reasonable mind might accept as adequate to support a conclusion only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake*,** 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also,* ***Ortco Contractors, Inc., v. Charpentier, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S. Ct. 825 (Dec. 1, 2003) (stating that the requirement is less demanding than the preponderance of the evidence standard); ***Conoco, Inc.***, 194 F.3d at 690 (stating that the hurdle is far lower than a ruling out standard); ***Stevens v. Todd Pacific Shipyards Corp.*,** 14 BRBS 626, 628 (1982), aff'd mem., 722 F.2d 747 (9th Cir. 1983) (stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); ***Holmes v. Universal Maritime Serv. Corp.*,** 29 BRBS 18, 20 (1995)(stating that the unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. ***Del Vecchio v. Bowers*,** 296 U.S. 280, 286-87 (1935); ***Port Cooper/T Smith Stevedoring Co., v. Hunter*,** 227 F.3d 285, 288 (5th Cir. 2000); ***Holmes v. Universal Maritime Serv. Corp*.,** 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. ***Director, OWCP, v. Greenwich Collieries*,** 512 U.S. 267, 281 (1994).

In this case there is no question that Claimant sustained an ankle injury on April 10, 2001 while at work. Thus, Claimant established both elements of a *prima facie* case namely harm and conditions which could have caused the injury, a slip and fall. Employer concedes that issue but contends that the injury was only a sprain which resolved itself within a period of several weeks with no residuals. Claimant on the other hand contends the injury was much more serious resulting in a June 4, 2001 diagnosis by Dr. Bernard of osteochondral defect of the talus and articular surface of the fibula of the right ankle and bone spur about the anterior aspect of the fibula with a lack of dorsiflexion of the ankle and pain and crepitus with ankle manipulation. Further, Dr. Bernard noted chronic pain and swelling preventing prolonged ambulation or standing due to an accident with symptoms appearing in April, 2001. (CX-2, p. 3). In addition Dr. Bernard noted that Claimant had not been released to return to work because of standing and walking restrictions and chronic ankle pain. However, when deposed Dr. Bernard attributed the diagnosis to a 4 year old ankle fracture and not an April, 2001 ankle injury.

D. Nature and Extent of Injury

Disability under the Act is defined as incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or

indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. ***Watson v. Gulf Stevedore Corp.***, 400 F.2d 649 (5th Cir. 1968); ***Seidel v. General Dynamics Corp.*,** 22 BRBS 403, 407 (1989); ***Stevens v. Lockheed Shipbuilding Co.*,** 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. ***Hite v. Dresser Guiberson Pumping***, 22 BRBS 87, 91 (1989). ***Care v. Washington Metro Area Transit Authority*,** 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. ***Lozada v. General Dynamics Corp.*,** 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); ***Sinclair v. United Food & Commercial Workers*,** 13 BRBS 148 (1989); ***Trask v. Lockheed Shipbuilding & Construction Co.*,** 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, ***Leech v. Service Engineering Co.*,** 15 BRBS 18 (1982), or if his condition has stabilized. ***Lusby v. Washington Metropolitan Area Transit Authority*,** 13 BRBS 446 (1981).

In this case all three orthopedists who either examined or treated Claimant testified that Claimant sustained an ankle sprain as a result of the April 10, 2001 injury which resolved within weeks without any residuals. Dr. Schutte released Claimant to full duty as of April 24, 2001. Dr. Bernard found no evidence of any sprain in June, 2001. Dr. Hebert who examined Claimant in December, 2002, found no evidence of any sprain. All three doctors found degenerative changes related to Claimant's 1997 non-work related injury. Although Claimant attributes his continuing ankle problems to his April 10, 2001 slip and fall the medical evidence does not support such a conclusion. Rather, the medical evidence shows Claimant suffering from degenerative changes which were not aggravated by Claimant's April 10, 2001 slip and fall. As such, Employer is not liable for either payment of compensation or medical benefits for such a condition beyond the short period needed for recovery. Employer continued payment of Claimant's wages through June 5, 2001 without loss of time or money to Claimant. Employer paid for all medical associated with the ankle sprain and is not liable to Claimant for payment of additional medical associated with surgery for correction of degenerative changes.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find no merit and deny the instant claim.

A

CLEMENT J. KENNINGTON
Administrative Law Judge